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MEMORANDUM

TO: Steve Kerbel and D.K. Williams

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: August 2, 2017

SUBJECT: Proposed initiative measure 2017-2018 #42, concerning Disposition of Government Fines, Surcharges, and Forfeitures

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

An earlier version of this proposed initiative, proposed initiative 2017-2018 #39, was the subject of a memorandum dated July 17, 2017. Proposed initiative 2017-2018 #39 was discussed at a public meeting on July 19, 2017. The substantive and technical comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meeting, except as necessary to fully understand the issues raised by the revised proposed initiative. However, the prior comments and questions that are not restated here continue to be relevant and are hereby incorporated by reference in this memorandum.

Purposes

The major purposes of the proposed amendment to the **Colorado Revised Statutes** appear to be:

1. To prohibit all governmental entities from collecting all penalties.
2. To make fines and penalties assessed by any governmental entity payable to either the victim of an offense or a registered charity.
3. To make a declaration that there is a conflict of interest when a government imposes a fine or penalty and receives the money generated by the fine or penalty.
4. To make a declaration that some regulatory entities fine businesses in order to generate funds.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Under section 1-40-105.5, Colorado Revised Statutes, the director of research of the legislative council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the Title Board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.
 - a. Will you submit the initiative to the Title Board? If so, when do you intend to do so?
 - b. Do you plan to submit an estimate in the future, and, if so, when do you intend to do so?
 - c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the legislative council staff at BallotImpactEstimates.ga@state.co.us.
2. Many sections of law direct how penalties would be spent. The provisions that direct how money would be spent would conflict with some of the provisions of this initiative. Would the proponents consider amending or at least cross referencing each section of law that directs what is done with penalties?

3. Throughout the proposed initiative, the term "registered and legitimate charity" is used.
 - a. Presumably, the proponents intend that a charity be registered by the Secretary of State's office in accordance with the "Colorado Charitable Solicitations Act": Is that correct?
 - b. Not every charitable organization is required to register in Colorado: is it the proponents' intent to omit those entities from eligibility to receive penalty money?
 - c. What do the proponents mean by "legitimate"? Who determines legitimacy?
4. The proposed initiative prohibits fine moneys from being paid to charities in which the fined person has a direct or indirect financial self-interest.
 - a. What constitutes indirect financial self-interest?
 - b. Who makes the determination as to whether such self-interest exists with respect to any charity?
5. The proposed initiative specifies that when a fine exceeds the amount of full restitution to an actual victim, "excess funds are to be donated to a charity of the choice of the fined individual or entity".
 - a. Must this recipient charity also be "registered and legitimate"? If so, would the proponents consider using that phrase consistently throughout the measure?
 - b. How is this donation effected? Does the county transmit the moneys to the charity? May the fined individual or entity claim a tax deduction for this donative transaction?
6. Section 8-43-306 (2), Colorado Revised Statutes, was amended by HB 17-1119 in the 2017 legislative session. The law currently requires fines imposed under that section to be transmitted to the Colorado uninsured employers fund for the purpose of providing a mechanism for the payment of covered claims to workers injured while employed by employers who have failed to obtain and maintain the required workers' compensation insurance. The fund would enable the state to pay the claims of injured workers, even if the claims exceed the amount of the fine. Is it your intent that damages paid to injured workers be limited to the amount of the fine?
7. Section 18-9-205, Colorado Revised Statutes, currently requires fines collected under section 18-9-204, Colorado Revised Statutes, which prohibits animal fighting, to be paid to the county where the animal fighting occurred and to be

- used to care for the animal involved in the fighting. The proposed amendment would require that the fine be paid to the victim, which in this case is the animal involved in the fighting. Typically, the animals involved in animal fighting are owned by the person who put them in the fight. Would the owner of the animal receive the money from the fine? If the owner is the person being fined, who would receive the money?
8. Section 25-15-311, Colorado Revised Statutes, deals with the disposition of fines for the improper disposal of hazardous waste. How would the victims be identified? How would a fine be divided among a group of victims?
 9. Sections 25-4-101 to 25-4-112, Colorado Revised Statutes, govern sanitary regulations in places where food is prepared. Section 25-4-110, Colorado Revised Statutes, currently requires the district attorneys of the various counties to prosecute all persons violating or refusing to obey those statutory regulations. The provision about prosecution has been removed in the proposed initiative. Is it your intent that violators will not be prosecuted? Would the two-hundred-dollar fine be divided among all victims?
 10. The purpose of part 1 of article 7 of title 25, Colorado Revised Statutes, is to provide a mechanism to ensure clean air in Colorado and to comply with federal pollution laws. Any victim of a failure to comply with these provisions would be the people of the state of Colorado, who would not have clean air to breathe. How would the fine be paid out to the people of the state?
 11. The language proposed in sections 30-15-103 and 30-15-408 refers to "the case": "... if there is no ordinance referring to the case," What is meant by the phrase "the case"?
 12. The language in section 42-1-217 (3) in SECTION 2 of the measure provides that the "courts shall have discretion..." The word "shall" means that a person "has a duty to," so the sentence means that "courts have a duty to have discretion." A better phrasing would be "the courts may extend the sixty-day deadline..."
 13. Section 42-1-217 (3) in SECTION 2 of the measure provides that the section is not limited to motor-vehicle penalties. The provision is located in title 42 of the Colorado Revised Statutes, which pertains to "vehicles and traffic." It appears that the provision is intended to apply to all fines imposed by a government entity. But given the location of the provision on title 42, it could be interpreted to apply just to government entities imposing fines or penalties under title 42. Is

- that the intention of the proponents for this provision? If the proponents intend to apply this section to other parts of state government, would the proponents consider placing a similar provision in title 24, which addresses state government generally?
14. Several sections of the provision use the phrase "the fined individual or entity," but other portions use the phrase "penalized person" when addressing the same person.
 - a. Generally, a drafter should use consistent language to clearly indicate the intent of the provision. Under section 2-4-401, Colorado Revised Statutes, a "person" is defined to include all legal entities. In addition, a fine is a subset of penalties, so "penalty" is a broader term than "fine." Would the proponents consider replacing "fined individual or entity" with "penalized person" consistently throughout the measure?
 - b. The phrase "person or entity" is redundant since under section 2-4-401, Colorado Revised Statutes, "person" means an individual or an entity, which can lead to a problem of interpretation under the rule of the last antecedent and the rule of statutory interpretation that every word be given meaning. Would the proponents consider deleting "or entity"?
 15. Although the word "such" has historically been used to indicate the statute is addressing a previously addressed person, place, or thing, the word "such" also includes additional but unmentioned people, places, things, or ideas that are similar to the previously addressed person, place, thing, or idea. Therefore, the current drafting best practice is to use the definite article, "the," instead of "such." Would the proponents consider replacing the word "such" with the word "the" whenever found in the proposal? In addition, the phrase "such money so collected" appears particularly likely to lead to confusion or misinterpretation.
 16. The proposal appears to, at times, use the terms "fines" and "penalties" interchangeably or as synonyms, but fines are a subset of penalties. The best drafting practice is to only use one word per definition. Would the proponents consider not using "fines" and "penalties" as synonyms?
 17. Article V, section 1 (4) specifies that all initiated measures take effect upon proclamation of the governor, "but not later than thirty days after the vote has been canvassed." Section 14 states that the measure takes effect upon the latter of the governor's proclamation or January 1, 2019. January 1 is likely to be beyond the 30-day period after the vote is canvassed, thus conflicting with the

constitution. Would proponents consider deleting “or January 1, 2019, whichever is later.”?

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. Each constitutional and statutory section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. When amending or repealing an entire section, the section number appears after the instruction word or phrase. When amending or repealing a subdivision of a section, the section number appears after "Colorado Revised Statutes" and the subdivision being amended or repealed appears after the instruction word or phrase. For example, if you intend to amend or repeal an **entire section**, you would use the following amending clause:

"In Colorado Revised Statutes, **repeal and reenact, with amendments**, 31-16-109 as follows:".

If you intend to amend or repeal a **subdivision** of a section, you would use the following amending clause:

"In Colorado Revised Statutes, 42-2-1210, **repeal and reenact, with amendments**, (3) as follows:".

The amending clauses for sections 5, 6, 7, 8, 9, 10, 11, 12, and 13 should have a comma after the phrase "with amendments". The amending clauses for sections 12 and 13 should end with "as follows:". In the amending clauses for sections 6 and 13, the section number should be moved to follow "Colorado Revised Statutes."

2. Each section in the Colorado Revised Statutes and the Colorado constitution has a headnote. Headnotes briefly describe the content of the section, should be in bold-faced type, and should end with a period. The headnotes for SECTION 1 and SECTION 14 and sections 8-43-306, 18-9-205, 25-14-208, 25-4-110,

- 25-7-129, 30-15-103, 30-15-408, 31-16-109, and 42-4-1210 should end with a period. The section number "42-1-217" should end with a period. In SECTION 14, There should not be a dash before the word "Effective."
3. Throughout the measure, and specifically in sections 42-1-217, 25-14-208 94)(a), 25-15-311, 25-4-110, 25-7-129, 30-15-103 (1), 30-15-408 (1), 31-16-109 (1), and 42-4-1210 (3), the word "governmental" should be "government."
 4. In section 42-1-217 (2), the phrase "60 day" should have a hyphen as follows: "60-day."
 5. In section 24-1-217 (3), the phrase "motor vehicle related penalties" should have hyphens as follows: "motor-vehicle-related penalties."
 6. The proposed initiative repeals and reenacts section 42-1-217, but several other current statutory sections refer to that section. In order to ensure that references to 42-1-217 found in other sections of statute are accurate, it is necessary to amend those other sections as well. Sections 24-4.1-119 (1)(f)(I), 24-4.2-104, 42-4-106 (5)(a)(V), 42-4-237 (4)(a), 42-4-1701 (4)(c)(II)(C) and (4)(d.5)(II)(B), and 43-4-205 (5.5)(a) need to be amended to harmonize the these references to section 42-1-217.
 7. Section 8-43-306 was amended in 2017 by House Bill 17-1119, which changed some of the language. To correctly repeal that section, the initiative should include the most current language:
 - a. Remove the word "such" in the first line;
 - b. Change "shall be" to "are";
 - c. Change "subsequent injury" to "Colorado uninsured employers"; and
 - d. Change "section 8-46-101" to "8-67-105."
 8. In section 25-14-208, the subsection number "(4)" appears after the headnote and at the beginning of the next line. One of the numbers should be removed. In section 42-4-1210, the subsection number "(3)" appears after the headnote and at the beginning of the next line. One of the numbers should be removed.
 9. Would proponents consider listing statutes in numerical order?